STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Applications of Clear Creek Radio, Inc. for a New NCE(FM) Station, Idaho Springs, Colorado*, Facility ID No. 172792, File No. BNPED-20071019AIY; *Fraser Valley Community Media, Inc. for a New NCE(FM) Station, Winter Park, Colorado,* Facility ID No. 175799 File No. BNPED-20071018BDM; *RV Ministries, Inc. for a New NCE(FM) Station, Fraser, Colorado*, Facility ID No. 174839, File No. BNPED-20071017AHY; *The North Fork Angling Society for a New NCE(FM) Station, Pine, Colorado*, Facility ID No. 174815, File No. BNPED-20071022AZK

On rare occasions, judges have issued *dubitante* opinions because they "doubted a legal point but w[ere] unwilling to state that it was wrong."[1] Here, I find myself in a somewhat similar predicament. If we were writing on a blank slate, I likely would have voted to grant this application for review. Were we to approve the Applicants' waiver request, the result probably would be more radio service for more residents of the Rocky Mountain region. Three new stations would be added to the airwaves instead of one. Moreover, all of the competing applicants have agreed that granting this waiver request would not lead to harmful interference.

Unfortunately, this case is not so simple. The Commission has adopted rules to prevent non-commercial FM stations from interfering with each other. These rules are not perfect. They can produce questionable outcomes when applied to certain terrain, such as the tall mountains of Colorado. Applicants argue that we should waive our rules under these circumstances. The Bureau responded below that this could result in a flood of waiver requests.

Ultimately, I am persuaded that this problem would be more appropriately addressed through a notice-and-comment rulemaking proceeding, and I hope that we will soon seek comment on how to fix it. This would be more efficient than requiring the Bureau to decide on a case-by-case basis whether our rules accurately predict interference in light of particular terrain. Indeed, we have bright-line rules precisely to avoid having to make such determinations on an ad-hoc basis.

The prospect of a Notice of Proposed Rulemaking, of course, provides cold comfort to the Applicants in this case. They maintain that because their circumstances are unique, granting them a waiver would not undermine enforcement of our rules. In other words, they are the proverbial purple cow.

The question then becomes how purple this particular cow is. It seems rather plum from my perspective, but this is a subjective assessment about which reasonable minds can disagree. Accordingly, I have decided to support this item, albeit *dubitante*.

[1] BLACK'S LAW DICTIONARY 515 (7th ed. 1999). *See, e.g.*, *United States v. Jeffries*, 692 F.3d 473, 483-86 (6th Cir. 2012) (Sutton, J., dubitante). Others do so in deed, if not with that precise word. *See*, *e.g.*, *Khan v. State Oil Co*., 93 F.3d 1358, 1363 (7th Cir. 1996) (Posner, C.J.) (applying decades-old Supreme Court antitrust precedent "despite all its infirmities, its increasingly wobbly, moth-eaten foundations").